

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appl. No. : 09/915,150
Applicant : Gary R. DelDuca *et al.*
Filed : July 25, 2001
Title : Modified Atmospheric Packages and Methods for Making the Same

TC/A.U. : 1761
Examiner : Jyoti Chawla

Docket No. : 47097-01080

**SIXTH DECLARATION OF GARY R. DELDUCA
UNDER 37 C.F.R. § 1.132**

Mail Stop Amendment
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313

Dear Commissioner:

I, Gary R. DelDuca, declare that:

1. I hold a degree of B.S. in Mechanical Engineering From Rochester Institute of Technology in Rochester, New York that was obtained in 1980.
2. From 1980-1995, I worked as a developmental and senior engineer for Mobil Chemical Company, Plastics Division. As a developmental engineer, I worked in process and product development in the area of foam products. As a senior engineer, some of my responsibilities included designing specialized machinery that included machinery directed to stacking trays for meat processes. Mobil Chemical Company, Plastics Division was purchased by Tenneco Inc. in 1995. From 1995 to the present, I have been a Technical Manager and/or Technical Sales Manager for Tenneco Packaging Inc. in the area of modified atmosphere packaging (MAP) for meats. My responsibilities have included designing, developing, and

implementing such modified atmosphere packaging for meat and processes using the same. In 1999, Tenneco Packaging Inc. was renamed Pactiv Corporation (“Pactiv”).

3. In The Office Action dated August 10, 2006, one of the arguments raised with respect to commercial success was that “it is not clear if the claimed invention resulted in the commercial success or whether other factors contributed to the success, such as increase[d] advertising/marketing.” Page 10 of the Office Action. I wish to provide additional evidence showing that the Pactiv improved ActiveTech® meat packaging system and process have been commercially successful without increased advertising/marketing.

4. Pactiv and its predecessor Tenneco Packaging Inc.¹ have sold modified atmosphere packaging systems beginning in 1998 (the traditional ActiveTech® meat packaging system). The Pactiv traditional ActiveTech® meat packaging system includes meats being placed in polystyrene trays and covered with oxygen-permeable, polyvinyl chloride (“PVC”) overwraps. The wrapped trays of meat are then placed in an outer barrier bag. Ambient air is removed and replaced with a blend of 30 vol.% carbon dioxide, and the balance being nitrogen.

5. Beginning in March of 2002, Pactiv began offering for sale an improved ActiveTech® meat packaging system. Pactiv’s improved ActiveTech® meat packaging system includes meats being placed in polystyrene trays and covered with oxygen-permeable, PVC overwraps. The wrapped trays of meat are then placed in an outer barrier bag. Ambient air is removed and replaced with a blend of 0.4 vol.% carbon monoxide (CO), 30 vol.% carbon dioxide, and the balance being nitrogen.

6. The modified atmosphere used in Pactiv’s improved ActiveTech® meat packaging system differs from the modified atmosphere used in the Pactiv’s traditional ActiveTech® meat packaging system. Specifically, Pactiv’s improved ActiveTech® meat packaging system uses 0.4 vol.% CO, while Pactiv’s traditional ActiveTech® meat packaging system does not use CO. Because of the addition of CO, the equipment used in Pactiv’s improved ActiveTech® meat packaging system may vary slightly as compared to Pactiv’s traditional ActiveTech® meat packaging system. Specifically, a mixer may be added to Pactiv’s improved ActiveTech® meat packaging system to mix the CO, carbon dioxide, and nitrogen.

¹ These will be collectively referred to Pactiv Corporation in the remainder of the declaration.

Additionally, a CO gas recovery hood and safety features may also be included in Pactiv's improved ActiveTech® meat packaging system.

7. The purchasers of either Pactiv's improved ActiveTech® meat packaging system or Pactiv's traditional ActiveTech® meat packaging system receive a license for the process and the knowledge to run such a process. Pactiv allows its customers to use its oxygen-absorber dispensing-machine at no cost. The remaining machinery used to perform either Pactiv's improved ActiveTech® meat packaging system or Pactiv's traditional ActiveTech® meat packaging system is purchased by the customer. Typically, this remaining machinery is sold by Pactiv to its customers. The customers also typically purchase the oxygen absorbers, trays, and film from Pactiv.

8. As shown below in the Table, sales of Pactiv's traditional ActiveTech® meat packaging system were decreasing in 2000 and 2001. The sales of Pactiv's improved ActiveTech® meat packaging system, however, have substantially increased since its introduction in March of 2002. The sales of Pactiv's improved ActiveTech® meat packaging system have been commercially successful with sales numbers of about or over 6 million in each of the years since 2003. The sales numbers below include the total of the purchased licenses, the purchased remaining machinery, and supplies (which include oxygen absorbers, activator fluid, and film).

TABLE

U.S. Sales Year	Sales of Traditional ActiveTech® (in millions)	Sales of Improved ActiveTech® (in millions)²
1998	0.5	0
1999	3.8	0
2000	2.6	0
2001	1.6	0
2002	0	2.8
2003	0	7.2
2004	0	7.1
2005	0	6.5
2006	0	4.5 ³

9. Since March of 2002, both Pactiv's improved ActiveTech® meat packaging system and Pactiv's traditional ActiveTech® meat packaging system have been available for sale. Since March 2002, no customer has purchased Pactiv's traditional ActiveTech® meat packaging system. In fact, every customer still practicing Pactiv's technology has converted its traditional ActiveTech® meat packaging system into Pactiv's improved ActiveTech® meat packaging system. Thus, to my knowledge no customer is still practicing Pactiv's traditional ActiveTech® meat packaging system. It can be concluded that these customers prefer the Pactiv's improved ActiveTech® meat packaging system over Pactiv's traditional ActiveTech® meat packaging system. The cost of Pactiv's improved ActiveTech® meat packaging system versus Pactiv's traditional ActiveTech® meat packaging system is fractionally more expensive. Thus, the commercial success of Pactiv's improved ActiveTech® meat packaging system cannot be attributed to a cost advantage.

² Pactiv's improved ActiveTech™ meat packaging system was not offered for sale until March 2002.

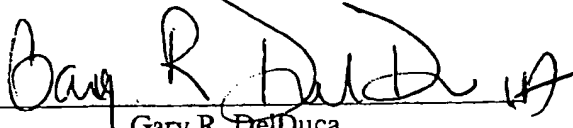
³ Sales through September of 2006.

10. Since 2002, there has been no increase in the number of sales personnel from Pactiv who are responsible for sales of Pactiv's improved ActiveTech® meat packaging system. In fact, the number of sales personnel who are responsible for sales of the Pactiv's improved ActiveTech® meat packaging system have decreased since 2002. There has been little or no advertising directed to sales of Pactiv's improved ActiveTech® meat packaging system since 2002. The amount of advertising, if any, has not increased since 2002 and likely has decreased substantially from that directed to Pactiv's traditional ActiveTech® meat packaging system. Thus, the commercial success of Pactiv's improved ActiveTech® meat packaging system cannot be attributed to increased marketing/advertising.

11. The process of manufacturing using Pactiv's improved ActiveTech® meat packaging system is an example of a process that would be covered under independent claims 1, 22 and 161 of the present application.

12. I hereby declare that all statements made of my own knowledge are true and that all statements made on information and belief are believed to be true; and, further, that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment or both under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any patent issuing thereon.

Date: November 6, 2006



Gary R. DeDuca